

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Petitioner,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UG-230968

**JOINT ENVIRONMENTAL
ADVOCATES' OPPOSITION TO
PSE'S MOTION TO STRIKE**

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I. INTRODUCTION

1. JEA oppose PSE's Motion to Strike Portions of Joint Environmental Advocates' Opening Brief. PSE's motion should be denied in its entirety as completely lacking support in the law.

II. BACKGROUND

2. Because of serious concerns posed by PSE's proposed tariff revision in Docket UG-230968, the Commission set this matter for adjudication in December 2023.¹ During this proceeding, an extensive record has developed that includes initial testimony from PSE, Staff, and JEA, cross-answering testimony by Staff, JEA, and Public Counsel, and rebuttal testimony from PSE.

3. JEA submitted an initial proposal for a risk-sharing mechanism that required PSE to share in 30% of the costs of allowance units purchased at the 97.5th percentile to the price ceiling maximum, with the total amount of sharing limited by an earnings test.² Public Counsel's witness, Dr. Robert Earle, critiqued JEA's methodology for calculating sharing bands,³ noted that PSE lacked incentives below the 97.5th percentile,⁴ and pointed out that the utility could purchase units on the secondary market priced above the price ceiling and therefore outside the sharing band JEA had proposed.⁵ JEA sent Public Counsel data requests to better understand Dr. Earle's suggested sharing band methodology.⁶

¹ Order 01, Docket UG-230968 (Dec. 22, 2023).

² See Gehrke, Exh. WG-1T, 21:19-22:11.

³ Earle, Exh. RLE-4C.

⁴ Earle, Exh. RLE-1T, 23:6-24:2.

⁵ Earle, Exh. RLE-1T, 21:3-22:4.

⁶ Earle, Exh. RLE-8X (methodology); Earle, Exh. RLE-9X (application to JEA's mechanism).

4. On October 9, 2024, the Commission held an evidentiary hearing attended by all intervening parties: PSE, Staff, JEA, Public Counsel, and AWEC. At the hearing, Staff, JEA, and Public Counsel cross-examined witnesses. PSE and AWEC did not cross-examine any witnesses.

5. JEA specifically cross-examined Public Counsel's expert witness to better understand and incorporate his analyses.⁷ JEA's witness, Mr. William Gehrke, then additionally flagged Public Counsel's critiques and noted how JEA's proposal could be improved.⁸ JEA's witness responded to a question from Chair Danner seeking clarification on the treatment of allowances purchased above the price ceiling.⁹ PSE did not ask questions or seek clarification at any point in the process.

6. PSE now asks to strike paragraphs 26 through 31 of JEA's Post-Hearing Brief. Paragraph 26 contains argument that JEA's proposal best addresses the Commission's objectives for the adjudication by identifying the central risks posed by PSE's compliance pathway choices. Paragraph 27 describes the proposal JEA initially submitted in response testimony, and the rationales underlying the mechanism. Paragraph 28 describes the critiques in Public Counsel's cross-answering testimony. Paragraph 29 engages with those critiques, restates JEA's rationale for their proposed mechanism and their decision to focus on PSE's compliance pathway choice. Paragraph 30 synthesizes JEA's proposal, recommending that the Commission adopt its initial proposal with three modifications; the first two incorporate Public Counsel's critiques and the third clarifies an ambiguity pointed out by Public Counsel and then Chair Danner. All three recommendations were made at the evidentiary hearing. Finally, JEA recommend that Public

⁷ Earle, Tr. 148:20-153:19 (normal versus actual distribution of data).

⁸ Gehrke, Tr. 170:15-23 (distribution methodology); 170:24-171:7 (sharing bands).

⁹ Gehrke, Tr. 176:5-20.

Counsel’s guidelines to address price risk be developed into an applicable mechanism for the end of the compliance period. Paragraph 31 again argues for the benefits of JEA’s proposal.

III. LEGAL STANDARD

7. This Commission has recognized that “[s]triking a party’s filing is a severe sanction that the Commission does not impose lightly, particularly when that filing assists the Commission in resolving disputed issues presented to it.”¹⁰ The Commission will not strike post-hearing briefs where a party refines their position and presents alternatives, so long as the party did not seek to intentionally prejudice other parties.¹¹

8. Recommendations or proposals by parties do not constitute “evidence” that are properly the subject of a motion to strike.¹² Rather, proposals are positions that parties arrive at with the benefit of a developed record.¹³ The extent to which a proposal in a brief is based in the record goes to the persuasiveness of the argument and not its propriety.¹⁴ The appropriate motion to address the challenging party’s concerns that another party’s briefs are allegedly unsupported by the evidence is a motion to file a reply where one was not already available.¹⁵

¹⁰ *WUTC. v. Puget Sound Energy*, Order 15, ¶ 16 Dockets UE-220066/UG-220067 (May 23, 2022).

¹¹ *WUTC. v. Puget Sound Energy*, Order 13, ¶ 24. Dockets UE-072300/UG-072301 (Jan. 15, 2009).

¹² *See In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶ 8, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000).

¹³ *Id.* ¶¶ 8, 10.

¹⁴ *See WUTC. v. Puget Sound Energy*, Order 13, ¶ 24, Dockets UE-072300/UG-072301 (Jan. 15, 2009).

¹⁵ *In the Matter of the Petition of Puget Sound Energy for (i) Approval of a Special Contract for Liquefied Natural Gas Fuel Service with Totem Ocean Trailer Express, Inc. and (ii) a Declaratory Order Approving the Methodology for Allocating Costs Between Regulated and Non-regulated Liquefied Natural Gas Services*, Order 04, ¶¶ 12-13, Docket UG-151663 (Dec. 18, 2015).

9. Unlike an arbitration-style proceeding where the Commission must “adopt the last-best offer of a party,” the Commission in adjudication may develop a proposal that best fulfills statutory and regulatory requirements for just, reasonable, and equitable rates.¹⁶

IV. ARGUMENT

10. PSE seeks to strike an entire section of JEA’s brief that provides context, incorporates discussion from the record, and clarifies JEA’s recommendations—all of which is intended to assist the Commission in resolving the issue of a risk-sharing mechanism. PSE argues the section in question (paragraphs 26 to 31) is an “improper attempt to present a new proposal that was not put forward or supported by evidence in this proceeding” and that parties did not have the opportunity to review or refute the proposal, resulting in prejudice to parties.¹⁷

11. To the extent that PSE’s motion implies JEA introduces new information that PSE has not had the opportunity to address or that JEA’s recommendations are unsupported by record evidence, PSE’s motion is procedurally inappropriate. JEA’s recommendations are not new evidence and can be challenged in PSE’s reply briefing.¹⁸ And as argued below, to the extent that PSE’s motion argues JEA’s recommendations prejudice the Company, PSE’s motion is meritless and overbroad.

¹⁶ *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 24, ¶ 75, Dockets UT-960369/UT-960370/UT-960371 (May 4, 2000).

¹⁷ Puget Sound Energy’s Motion to Strike Portions of Joint Environmental Advocates’ Opening Brief ¶ 1, Docket UG-230968 (Nov. 15, 2024) (hereinafter “PSE’s Motion to Strike”).

¹⁸ *See In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶ 8, 10-11, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000); *In the Matter of the Petition of Puget Sound Energy for (i) Approval of a Special Contract for Liquefied Natural Gas Fuel Service with Totem Ocean Trailer Express, Inc. and (ii) a Declaratory Order Approving the Methodology for Allocating Costs Between Regulated and Non-regulated Liquefied Natural Gas Services*, Order 04, ¶¶ 12-13, Docket UG-151663 (Dec. 18, 2015).

A. JEA is Permitted to Adjust and Make Recommendations in Briefing.

12. Parties are allowed to make recommendations and arguments that develop in light of the record.¹⁹ This Commission has declined to strike suggested remedies and alternatives proffered by parties in briefs where there is sufficient evidence in the record to enable the Commission to reach the merits, there is no intentional effort by a party to prejudice another by raising an issue for the first time in a brief, and the complaining party has had an opportunity to address the issues contemplated in the recommendation.²⁰

13. As explained in detail below in subsection B, JEA have not presented their recommendations for the first time in briefing and they have based their recommendations on ample evidence in the record. There is no basis to argue that JEA has intentionally sought to prejudice PSE, given JEA's discussion on the record about Public Counsel's critiques and JEA's proposed modifications. PSE chose not to engage in cross-examination, and it had the opportunity to respond to JEA's recommendations in its reply briefing.

14. Moreover, preventing JEA from incorporating what parties learned through the course of adjudication would obviate the purpose of responsive and cross-answering testimony, a hearing, and briefing, and it would ultimately be unhelpful to the Commission. A party need not have perfectly synthesized its recommendations prior to the close of the record; it is the purpose

¹⁹ See *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶¶ 7-8, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000).

²⁰ See *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶¶ 8-11, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000) (finding party's change in recommendation from four-zone to five-zone proposal permissible and challenging party had ample opportunity to address during hearing, and allowing reply briefing); *WUTC v. Puget Sound Energy*, Order 13, ¶ 24, Dockets UE-072300/UG-072301 (Jan. 15, 2009) (allowing parties to argue for remedies not suggested by witnesses because support in record and no prejudice).

of briefing to improve recommendations with all the evidence at hand.²¹ The refinement of proposals helps the Commission regulate and issue orders that best ensure fair, reasonable, and equitable rates.²²

15. Because motions to strike are disfavored, and the equitable factors that would support doing so are not present here—that is, there is no prejudice to PSE and the Company has had opportunity to respond to issues raised in the recommendations—there is no basis to strike the challenged portion of JEA’s brief.

B. JEA’s Recommendations in Briefing Are Based on the Record and Do Not Prejudice PSE.

16. There is nothing new in JEA’s post-hearing brief that would support a motion to strike. The premise of PSE’s motion is that JEA “effectively withdrew” their prior proposal and that “the proposal presented in JEA’s brief is a completely new mechanism that differs fundamentally from the proposal JEA presented prior to the evidentiary hearing.”²³ Neither of these characterizations are accurate. JEA expressly recommended in their post-hearing brief that the Commission “adopt [their] risk-sharing mechanism ... with the following modifications.”²⁴ JEA did not withdraw their prior recommendation. Their suggested modifications are either minor methodological changes or clarifications, and support for Public Counsel’s recommendation that arose over the course of the adjudication. Contrary to PSE’s claims, JEA’s

²¹ See *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶ 8, 10, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000).

²² *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 24, ¶ 75, Dockets UT-960369/UT-960370/UT-960371 (May 4, 2000).

²³ PSE’s Motion to Strike ¶¶ 3-4.

²⁴ JEA’s Post-Hearing Brief ¶ 30.

recommendations are well-supported by evidence and analysis in the record.²⁵ And the recommendations reflect JEA, Public Counsel, and Staff's good-faith participation and willingness to share insights through testimony, data requests, and cross-examination at hearing, which PSE did not choose to avail itself of.

17. First, JEA's intention to adjust the calculation of sharing bands from normalized distribution to direct percentiles was explicitly shared during the evidentiary hearing and is supported by the record.²⁶ JEA modified its recommendation based on Public Counsel's analysis on the matter in its cross-answering testimony.²⁷ JEA sent data requests, available to PSE and incorporated into the record, asking Public Counsel's witness about how to calculate actual percentiles and apply them to JEA's mechanism.²⁸ At the hearing, Public Counsel's witness, Dr. Robert Earle, fleshed out the how and why of using direct percentiles, and confirmed that JEA could apply it to the mechanism laid out in JEA's Exh. WG-3.²⁹ JEA's witness, Mr. Gehrke, then confirmed that he suggested modifying JEA's proposal to use actual percentiles rather than normal distribution.³⁰ At no point did PSE raise concerns or questions about this methodology. It did not even cross examine Dr. Earle or Mr. Gehrke about their testimony. It is particularly

²⁵ Cf. PSE's Post-Hearing Brief ¶ 5.

²⁶ Gehrke, Tr. 170:14-23 (clarifying modification to JEA's proposal to use actual percentiles rather than normal distribution).

²⁷ Earle, Exh. RLE-4C.

²⁸ Earle, Exh. RLE-8X (methodology); Earle, Exh. RLE-9X (application to JEA's mechanism).

²⁹ Earle, Tr. 149:1-25 (normal distribution is technical error, referencing Exh. RLE-4C); 150:1-151:24 (methodology, also contained in exhibit); 152:15-19 (more accurate to use direct percentiles); 153:1-19 (appropriate application to JEA's model, referencing Exh. WG-3). *See In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*, Order 23, ¶¶ 7-8, 10, Dockets UT-960369/UT-960370/UT-960371 (Apr. 10, 2000) (proposal in brief can be based on discussion at hearing).

³⁰ Gehrke, Tr. 170:15-23.

surprising that PSE quibbles with JEA's updated methodology, given that it is the methodology PSE itself uses in some workpapers to calculate percentiles.³¹

18. Second, JEA raised the addition of a second sharing band during the hearing. That suggestion was responsive to Public Counsel's critique about discontinuous penalties, which Public Counsel had initially raised in cross-answering testimony.³² Public Counsel's concern was that there was no incentive for PSE below the 97.5th percentile.³³ JEA agreed and Mr. Gehrke stated he thought "it would be appropriate ... to add another sharing band, for example, from the 90th to the 97.5th percentile."³⁴ Here again, PSE had the opportunity to both cross examine Mr. Gehrke or Dr. Earle, but chose not to.

19. Third, JEA clarified at the hearing how they proposed to treat units purchased above the price ceiling. This question had initially been raised by Public Counsel³⁵ and Chair Danner also asked Mr. Gehrke how JEA recommended handling situations where allowance unit costs exceeded the price ceiling.³⁶ JEA had initially discussed a deadband below the 97.5th percentile, and a band alpha between the 97.5th percentile to the maximum ceiling price,³⁷ but not a hypothetical unit purchased above that price because of the guardrails placed on prices for covered entities. JEA assumed the utility would not imprudently spend more on the secondary market to acquire an allowance it could obtain through Ecology auctions. As Public Counsel

³¹ See Earle, Exh. RLE-4C p. 1 (noting actual percentiles in PSE's calculations, though presentation appears to then use normal z-scores), 5 (noting PSE's use actual percentiles).

³² See Earle, Exh. RLE-1T, 23:6-24:2.

³³ *Id.*

³⁴ Gehrke, Tr. 170:24-171:7.

³⁵ Earle, Exh. RLE-1T, 21:3-22:4.

³⁶ Danner, Tr. 175:22-176:4.

³⁷ See Gehrke, Exh. WG-1T, p. 22, Table at line 12.

pointed out, however, market prices could go above the ceiling price and a utility might buy at that price.³⁸ Taking into account Public Counsel’s well-founded concern about treatment of such an allowance, Mr. Gehrke clarified to Chair Danner that JEA would treat the difference between the price paid and the price ceiling as imprudent (and thus not charged to ratepayers), and the remaining amount treated as a price ceiling unit pursuant to JEA’s mechanism.³⁹

20. Finally, JEA recommended in their post-hearing brief that the Commission adopt an added component to the risk-sharing mechanism that addresses Public Counsel’s price risk concerns. This recommendation is not new—it is Public Counsel’s. The rationales behind, and guidelines for how to develop, this component are contained in Public Counsel’s cross-answering testimony.⁴⁰ JEA simply state their support for Public Counsel’s approach.

21. Because nothing in the challenged paragraphs introduces new evidence and because JEA’s recommendations are supported by the record, there is no basis to strike them from the brief. And similarly, because these paragraphs contain no surprise, there is no prejudice to PSE, which could—and did—respond to JEA’s arguments in its reply brief.⁴¹ JEA have sought to engage deeply with the complex matters in this docket and has been responsive to facts as developed in the record. They should not be penalized for attempting to produce improved recommendations based on evidence developed throughout the proceedings.

³⁸ Earle, RLE-1T, 22:9-12.

³⁹ Gehrke, Tr. 176:5-20.

⁴⁰ Earle, Exh. RLE-1CT, 6:8-16 (provide incentives to improve allowance trading), 18:13-15 (same), 25:1-26:16 (guidelines for developing component addressing price risk). *See WUTC v. Puget Sound Energy*, Order 13, ¶ 24, Dockets UE-072300/UG-072301 (Jan. 15, 2009) (allowing parties to argue for remedies not suggested by own witnesses because support in record and no prejudice).

⁴¹ *See Reply Brief of Puget Sound Energy*, ¶¶ 7-9, Docket UG-230968 (Nov. 21, 2024).

C. PSE's Motion Is Overbroad, As It Attacks in Large Part Descriptions of Proceedings or Legal Argument

22. In addition, PSE's motion is overbroad in seeking to strike paragraphs that simply describe the proceedings in this docket or that make legal argument. Specifically, paragraphs 26 to 29 of JEA's post-hearing brief describe the course of proceedings, namely: 1) JEA's risk-sharing mechanism as presented in the opening testimony of its witness, Mr. Gehrke, 2) the critiques of Public Counsel and JEA's responses to those critiques, and 3) JEA's position on the significance of those critiques and responses. PSE fails to explain how any of these paragraphs constitute new evidence such that they should be struck as impermissibly extra-record or prejudicial. These paragraphs describe the content of filed testimony, which PSE has presumably read, and discussions at the evidentiary hearing, which PSE attended. Indeed, PSE describes much of what is contained in those paragraphs in its motion.⁴² There is nothing new here, and thus nothing improper or prejudicial to PSE.

23. Furthermore, paragraphs 29 and 31 of JEA's brief make legal arguments about the nature of the risk being addressed, how JEA's proposal balances statutory and regulatory directives, and why a risk-sharing mechanism is appropriate. A brief is an appropriate place for argument such as this, and there is nothing inappropriate about the contents of these paragraphs.⁴³

24. In sum, there is no reason to strike the contested portions of JEA's brief. Paragraphs 26-31 constitute legal argument or recommendations for a risk-sharing mechanism

⁴² See PSE's Motion to Strike ¶ 3. JEA contest, however, mischaracterizations in that description—namely, that PSE and Public Counsel found “critical flaws” in JEA's mechanism, that JEA “effectively withdrew its proposal” in briefing, or that JEA attempt to use their brief to present “an entirely new risk-sharing mechanism.” *Id.*

⁴³ WAC 480-07-390; WAC 480-07-395(1)(c).

that are well-supported by the record. Recommendations that were based on the record and discussed at the hearing pose no unfair surprise to PSE, and the Company had the opportunity to address those recommendations in its reply brief, therefore suffering no prejudice.

V. CONCLUSION

25. JEA respectfully requests PSE's Motion to Strike be denied in full.

Dated this 22nd day of November, 2024.

Respectfully submitted,

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